

STATE OF MICHIGAN
COURT OF APPEALS

MARQUIS DYER,

Plaintiff-Appellant,

v

EDWARD P. TRACHTMAN, D.O.,

Defendant-Appellee.

UNPUBLISHED

January 12, 2006

No. 264681

Oakland Circuit Court

LC No. 2000-024036-NH

Before: Murray, PJ. and Jansen and Kelly, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff appeals as of right the trial court's order granting summary disposition in defendant's favor on the basis of plaintiff's failure to file an effective affidavit of merit before the statutory period of limitations expired. We affirm.

I. Facts

In a complaint filed on May 13, 1999, plaintiff alleged that he was injured during an independent medical examination (IME), which he underwent for an unrelated civil action. Plaintiff alleged that, during the IME, defendant forcefully rotated his right arm and shoulder 90 degrees, detaching the labrum from the right shoulder. Plaintiff alleged professional negligence, battery, and breach of contract. Defendant filed a motion for summary disposition, asserting that all of the claims sounded in professional negligence, but there was no physician-patient relationship within the context of an IME. Plaintiff abandoned the medical malpractice claim and filed a motion to amend the complaint to include an ordinary negligence claim. The trial court granted defendant's motion for summary disposition on all plaintiff's claims and denied plaintiff's motion to amend as futile.

In a prior appeal in this Court, plaintiff argued that, although there was no physician-patient relationship in the context of an IME, an ordinary negligence claim was not barred. This Court, concluding that plaintiff's claim was grounded in ordinary negligence, affirmed in part, reversed in part, and remanded the case to the trial court. *Dyer v Trachtman*, 255 Mich App 659; 662 NW2d 60 (2003). After granting leave, our Supreme Court decided that plaintiff's claim sounded in medical malpractice, recognized a limited physician-patient relationship in an IME setting, reversed this Court's decision, and remanded to the case trial court reinstating plaintiff's medical malpractice claim. *Dyer v Trachtman*, 470 Mich 45; 679 NW2d 311 (2004).

After the case was remanded to the trial court, plaintiff filed an amended complaint with the same affidavit of merit that he had filed with his original complaint, which was signed by an orthopedic surgeon.¹ Defendant filed a motion for summary disposition arguing that the affidavit was insufficient because defendant was a board certified physiatrist or physical medical and rehabilitation doctor. Defendant argued, among other things, that, pursuant to MCL 600.2169, plaintiff was required to file an affidavit signed by a specialist who was board certified in the same specialty as defendant. Plaintiff responded arguing that the affidavit of merit substantially complied with the statute because the expert was a specialist in IMEs and defendant is a specialist in IMEs. The trial court ruled that plaintiff's expert did not meet the requirements of MCL 600.2169 because he did not have the same board certification as defendant. The trial court further determined that plaintiff failed to file a conforming affidavit of merit before the statutory period of limitation expired. The trial court entered an order granting defendant's motion for summary disposition. Plaintiff now appeals this order.

II. Analysis

Plaintiff contends that the trial court erred in granting defendant's motion for summary disposition. We disagree.

"We review de novo decisions regarding summary disposition motions." *Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004). "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. In determining whether summary disposition was properly granted under 2.116(C)(7), this Court 'consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them.'" *Id.* (citation omitted).

The first question we must address is whether plaintiff's affidavit of merit was defective. MCL 600.2912d provides that a plaintiff "shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169." MCL 600.2169 provides "if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty." Defendant is a board certified physiatrist or physical medicine/rehabilitation doctor. Plaintiff's expert is a board certified orthopedic surgeon. Because plaintiff's expert does not meet the requirements of MCL 600.2169, he is not qualified to offer expert opinion testimony on the standard of care.

Plaintiff, however, asserts that the affidavit of merit was not defective because plaintiff's attorney reasonably believed that his expert met the requirements under MCL 600.2169. More specifically, plaintiff contends that because our Supreme Court created a limited physician-patient relationship in an IME setting and a physician conducting an IME is not treating or diagnosing a patient, it is more appropriate to require the testifying expert to be one who conducts IMEs rather than one who is board certified in the same specialty as defendant.

¹ This affidavit, unlike the original, was notarized.

However, MCL 600.2169 does not permit this, our Supreme Court did not create such an exception to the statute, and we decline to recognize such an exception in this case. Furthermore, despite plaintiff's assertion that defendant's specialty is not relevant to the standard of care in this case, plaintiff alleged in his original and amended complaints that defendant "was a licensed medical practitioner specializing in physical medicine and rehabilitation" and owed a duty to "practice medicine with the reasonable skill and competence of an average physician engaged in that specialty." To support this claim, plaintiff was required to have the standard of care set forth by another physician of the same specialty. Because plaintiff's expert was not board certified in the same specialty as defendant, we conclude that plaintiff's affidavit of merit was defective.

We next address what effect plaintiff's defective affidavit of merit had on his claim. In *Geralds v Munson Healthcare*, 259 Mich App 225, 240; 673 NW2d 792 (2003), this Court held that because the plaintiff filed an affidavit of merit signed by an expert who was not board certified in the same specialty as the defendant, the plaintiff's complaint was insufficient to commence a medical malpractice action. In this case, plaintiff's affidavit was defective in the same manner. Plaintiff filed the same affidavit of merit with both his original complaint alleging medical malpractice and his amended complaint alleging medical malpractice. According to *Geralds*, because the affidavit of merit was defective, plaintiff's complaints did not commence a medical malpractice action or toll the statutory period of limitations.

Plaintiff nonetheless contends that, pursuant to *Bryant v Oakpointe Villa Nursing Center*, 471 Mich 41; 684 NW2d 864 (2004), the statutory period of limitation was tolled because there was confusion about the nature of plaintiff's claim. We disagree. Unlike the plaintiff in *Bryant*, who initially filed an ordinary negligence claim, plaintiff initially filed a medical malpractice claim with a defective affidavit of merit. Even after our Supreme Court remanded this case and reinstated plaintiff's medical malpractice claim, plaintiff filed the *same* defective affidavit of merit with his amended complaint. This complaint too was a nullity. It is undisputed that, without tolling, the statutory period of limitation had expired long before the trial court entered the order dismissing plaintiff's claim. Therefore, the trial court did not err in dismissing plaintiff's claim with prejudice.

Affirmed.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly